Supreme Court, U.S.
FILED
JAN 13 2010
OFFICE OF THE CLERK

No. 09-542

IN THE

Supreme Court of the United States

MITCHELL N. KAY AND
LAW OFFICES OF MITCHELL N. KAY, P.C.,
PETITIONER

v.

JOSE GONZALEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

MATTHEW B. PROBUS
Counsel of Record

Wauson ♦ Probus
One Sugar Creek Ctr. Blvd.
Suite 880
Sugar Land, TX 77478
(281) 242-0303

CURRY & TAYLOR ♦ (202) 393-4141

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

RESPONSE TO STATEMENT OF THE CASE 1

REASONS THE PETITION SHOULD BE DENIED 3

A. The Fifth Circuit's Decision in *Gonzalez v. Kay*, is Not in Conflict with the Second Circuit's Decision in *Greco v. Trauner, Cohen & Thomas, LLP* 3

B. The Fifth Circuit's Decision in *Gonzalez v. Kay*, is Not in Conflict with Other Courts of Appeals on the Issue of Whether Review of a Collection Letter Should be a Question of Law for the Court or a Question of Fact for the Jury 8

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

BARTLETT V. HEIBL, 128 F.3D 497, 501 (7TH CIR. 1997) 15, 16, 17
CLOMON V. JACKSON, 988 F.2D 1314 (2D CIR. 1993) 5, 7
FEDERAL HOME LOAN MORTGAGE CORP. V. LAMAR, 503 F.3D 504, 509 - 510 (6TH CIR. 2007) 15
GONZALEZ V. KAY, 577 F.3D 600, 607 (5TH CIR. 2009) .. *passim*
GOSWAMI V. AMERICAN COLLECTION ENTERPRISES, INC. 377 F.3D 488 (5TH CIR. 2004), CERT. DENIED, 126 S.CT. 331, 163 L.ED.2D 44 (2005) 18
GRECO V. TRAUNER, COHEN & THOMAS, LLP, 412 F.3D 360 (2D CIR. 2005) 3, 4, 5, 6
KISTNER V. LAW OFFICES OF MICHAEL P. MARGELEFSKY, LLC, 518 F.3D 433 (6TH CIR. 2008) 7, 15
PAYCO-GENERAL AM. CREDITS, INC., 943 F.2D 482, 485 (4TH CIR. 1991) 14, 15
PETER V. G.C. SERVICES, LP, 310 F.3D 344, 349 - 350 (5TH CIR. 2002) 15
ROSENAU V. UNIFUND CORP., 539 F.3D 218 (3D CIR. 2009) 7
SHAPIRO V. DUN & BRADSTREET RECEIVABLE MGMT. SERVS., INC., 59 FED. APPX. 406, 407-08 (2D CIR. 2003) 11
RUSSELL V. EQUIFAX A.R.S., 74 F.3D 30, 34 (2D CIR. 1996) 11
TAYLOR V. PERRIN, LANDRY, DELAUNAY & DURAND, 103 F.3D 1232 (5TH CIR. 1997) 7
TERRAN V. KAPLAN, 109 F.3D 1428, 1432 (9TH CIR. 1997) 11, 13
VEGA V. MCKAY, 351 F.3D 1334 (11TH CIR. 2003) 15
WILHELM V. CREDICO, INC., 519 F.3D 416 (8TH CIR. 2008) 15
WILSON V. QUADRAMED CORP.,225 F.3D 350, 353 N. 2 (3D CIR. 2000) 11, 12, 13

STATUTES

15 U.S.C. § 1692a(2) 8
15 U.S.C. § 1692a(6) 10
15 U.S.C. § 1692b 8
15 U.S.C. § 1692c 8
15 U.S.C. § 1692e 9
15 U.S.C. § 1692e(3) 8
15 U.S.C. § 1692e(8) 8
15 U.S.C. § 1692e(9) 9
15 U.S.C. § 1692e(11) 9
15 U.S.C. § 1692f(7) 9, 10
15 U.S.C. § 1692f(8) 9, 10
15 U.S.C. § 1692g 10
15 U.S.C. § 1692g(b) 10
15 U.S.C. § 1692j 10
15 U.S.C. § 1692k(a)(2)(A) 19
15 U.S.C. § 1692k(a)(3) 19

RULES

FED. R. CIV. P. 12(b)(6) 3

RESPONSE TO STATEMENT OF THE CASE

Pursuant to Rule 15 of the Rules of the Supreme Court of the United States, the Respondent offers this response and clarification to the Petitioners' Statement of the Case.

In the last sentence of the Petitioners' Statement of the Case, the Petitioners assert that the "Fifth Circuit remanded the case back to the District Court for a jury trial on the issue of whether the 'Least Sophisticated Consumer' would be deceived into thinking that a lawyer is involved in the collection of Respondent's debt simply because the disclaimer language approved by the Second Circuit was contained on the back of the letter and not on the front."[1] This is an inaccurate characterization of the Fifth Circuit's decision. The Fifth Circuit stated:

> We acknowledge that this is a close case, which is why further inquiry at the District Court is necessary. ***Based only on the allegations in the Complaint and the letter itself, reasonable minds can differ as to whether this letter is deceptive***. Although the mere presence of disclaimer language might be dispositive in certain circumstances, the ***context and placement*** of that disclaimer is also important. ***We do not construe the disclaimer in isolation but must analyze whether the letter is misleading as a whole***. We caution lawyers who send debt collection letters to state clearly, prominently, and conspicuously, that although the letter is from a lawyer, the lawyer is acting solely as a debt collector and not in any

---

[1] Petition for a Writ of Certiorari, page 4.

> legal capacity when sending the letter. The disclaimer must explain to even the least sophisticated consumer that lawyers may also be debt collectors and that the lawyer is operating only as a debt collector at that time. ***Debtor collectors acting solely as debt collectors must not send the message that a lawyer is involved, because this deceptively sends the message that the "price of poker has gone up."***[2]

The Fifth Circuit's allusion to the importance of "the allegations in the complaint," the "context" of the disclaimer, and the prohibition against debt collectors acting solely as debt collectors sending any message that a lawyer is involved, stems from its recognition early in the opinion of the Respondent's claim as pleaded in the Complaint:

> Gonzalez essentially contends that the Kay Law Firm is not actually a law firm at all but instead is a debt collection agency that uses the imprimatur of a law firm to intimidate debtors into paying their debts.[3]

Thus, the position of the disclaimer was only one factor in the Fifth Circuit's decision to remand the case to the District Court for further proceedings. The Fifth Circuit based its decision on the allegations in the Complaint, the facts (as pleaded and accepted as true) underlying the letter, and the letter as a whole, which included the language, context, and position of the

---

[2] *Gonzalez v. Kay*, 577 F.3d 600, 607 (5th Cir. 2009) (emphasis added) (*quoting Avila v. Rubin*, 84 F.3d 222, 229 (7th Cir. 1996).

[3] *Id.* at 603.

disclaimer and determined that reasonable minds could differ as to whether the letter was deceptive.

REASONS THE PETITION SHOULD BE DENIED

There is no conflict among the Circuit Courts of Appeals on any issue involved in this case. No Circuit Court of Appeals other than the Fifth Circuit Court of Appeals has decided whether a disclaimer worded like the one at issue and placed on the back of a collection letter sent by a collection agency purporting to be a law firm can save a debt collector from violations of § 1692e(3) and (10) on a motion to dismiss under Fed. R. Civ. P. 12(b)(6). Therefore, this Court should deny the Petition for a Writ of Certiorari.

A. The Fifth Circuit's Decision in *Gonzalez v. Kay,* is Not in Conflict with the Second Circuit's Decision in *Greco v. Trauner, Cohen & Thomas, LLP.*

The Petitioners contend that the Fifth Circuit's decision in this case is in conflict with the decision reached by the Second Circuit Court of Appeals in *Greco v. Trauner, Cohen & Thomas, LLP* [4] (referred to hereinafter as "*Greco*"). This is not true. In reaching its decision in this case, the Fifth Circuit relied on the same jurisprudence that the Second Circuit relied on in *Greco.* The Fifth Circuit reached a different decision than the Second Circuit, because the allegations in the Respondent's complaint and the content of the letter were different in this case than in *Greco.*

The Petitioners have tried to paint the case below as identical to *Greco.* It is not. The only similarity is the wording of the disclaimer at issue. In *Greco,* the Second

---

[4] 412 F.3d 360 (2d Cir. 2005).

Circuit began its opinion characterizing the plaintiff's allegations as follows:

> First, he asserted that ***the letter misleadingly represented the level of attorney involvement***, thereby violating, in violation of § 1692e's general ban on deceptive practices in connection with debt collection, § 1692e(3)'s ban on falsely representing that an individual is an attorney, and § 1692e(10)'s ban on deceptive means to collect a debt.[5]

In this case, the Fifth Circuit began its opinion characterizing the Respondent's allegations as follows:

> . . . Gonzalez asserted in his complaint that the letter was deceptive in that the Kay Law Firm "pretended to be a law firm with a lawyer handling collection of the Account when in fact no lawyer was handling the Account or actively handling the file." ***Gonzalez essentially contends that the Kay Law Firm is not actually a law firm at all but instead is a debt collection agency that uses the imprimatur of a law firm to intimidate debtors into paying their debts***.[6]

The Fifth Circuit in this case was not faced with an allegation about only the level of Petitioners' attorney involvement with the debt – it was faced with an allegation that the Petitioners are not a law firm at all, but merely a collection agency posing as a law firm. This is a key distinction between the cases that cannot be lost.

---

[5] *Greco*, 412 F.3d at 362 (emphasis added).

[6] *Gonzalez*, 577 F.3d at 603. (emphasis added).

The fact that the Petitioners' collection letter included a disclaimer worded like the disclaimer used in the letter in *Greco* misses the point – of course no attorney had reviewed the debtor's account in this case, because the Petitioners are not a law firm but a collection agency pretending to be a law firm!

Despite the crucial differences between the allegations in this case and *Greco*, both the Fifth Circuit and the Second Circuit analyzed the cases before them using the analysis provided in the Second Circuit's opinion in *Clomon v. Jackson*[7]. Both courts even quoted the same paragraph at page 1321 of the *Clomon* case.[8] In that paragraph, the Second Circuit in *Clomon* held that use of an attorney's signature on a collection letter implies that the letter is "from" the attorney who signed it and in the absence of language to the contrary that "the attorney signing the letter formed an opinion about how to manage the case of the debtor to whom the letter was sent."[9] The Court in *Clomon* continued to opine that because in most mass mailings this is false, that there would be few, if any, cases "in which a mass-produced collection letter bearing the facsimile of an attorney's signature will comply with the restrictions imposed by § 1692e."[10] This was the starting point for both the *Greco* court and the *Gonzalez* court.

This was, however, also the ending point for the Second Circuit in *Greco*, because the only allegation made by the plaintiff in that case was that no attorney was involved in reviewing the account before preparing the collection letter. The plaintiff in *Greco* did not allege

---

[7] 988 F.2d 1314 (2d Cir. 1993).

[8] *See Gonzalez*, 577 F.3d at 604-05; *Greco*, 412 F.3d at 364.

[9] *Clomon*, 988 F.2d at 1321.

[10] *Id.*

facts about the defendant or its operations outside of the letter that had bearing on whether the language of the letter was deceptive. There was a disclaimer in the body on the front of the collection letter stating that no attorney had yet reviewed the account. Applying the "least sophisticated consumer" standard, the Second Circuit decided that this letter could not have misled even the least sophisticated consumer into believing that an attorney was involved in reviewing the account before the letter was prepared.

The Fifth Circuit did not ignore *Greco* and did not contradict it. Immediately after its discussion of the jurisprudence of the *Clomon* case, the Fifth Circuit began a discussion of the decision reached in *Greco*.[11] The Fifth Circuit quoted *Greco* at length to the effect that "attorneys can participate in debt collection in any number of ways, without contravening the FDCPA, so long as their status as attorneys is *not misleading*."[12] The Fifth Circuit did recognize that *Greco* was based on the language of the disclaimer and not the position of the disclaimer. The Fifth Circuit also noted that in *Greco* the disclaimer was included in the body of the letter on the front; not a disclaimer on the back. In addition, as it had already stated in the opinion, the Fifth Circuit in this case was dealing with factual allegations in the Respondent's complaint that differed from those in *Greco*. Namely, that the Petitioners were not a law firm but were posing as one. Under the standard of review for dismissal under Rule 12(b)(6), the Fifth Circuit was obligated to take those factual allegations as true.

---

[11] *Gonzalez*, 577 F.3d at 605.

[12] *Id.* (*quoting Greco*, 412 F.3d at 364).

The Fifth Circuit, faced with different factual allegations, a differently worded collection notice, and a disclaimer on the back instead of the front of the collection notice, was required to look further than the Second Circuit in *Greco*.

The Fifth Circuit recognized that there are generally three common situations that arise with respect to collection notices: (1) those collection letters that are clearly in violation of the FDCPA based on their language and complete lack of any disclaimer,[13] (2) those collection letters that are clearly not in violation of the FDCPA based on their language and the placement of their disclaimers, and (3) those collection letters that fall somewhere in between due to contradictory messages. The Fifth Circuit also recognized that *Greco* was a case in which the collection letter was clearly not a violation of the FDCPA. However, the Fifth Circuit held that the case before it, with the facts and allegations pleaded, was a case that presented a question of fact for a jury to determine.

This decision does not present a conflict with the Second Circuit's *Greco* decision. This Court should deny the Petition for a Writ of Certiorari.

---

[13] *Gonzalez*, 577 F.3d at 606 (Court citing *Rosenau v. Unifund Corp.*, 539 F.3d 218 (3d Cir. 2009), *Kistner v. Law Offices of Michael P. Margelefsky, LLC*, 518 F.3d 433 (6th Cir. 2008), *Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F.3d 1232 (5th Cir. 1997), and *Clomon v. Jackson*, 988 F.2d 1314 (2d Cir. 1993) as cases that dealt with letters that were clearly in violation of the FDCPA).

B. The Fifth Circuit's Decision in *Gonzalez v. Kay*, is Not in Conflict with Other Courts of Appeals on the Issue of Whether Review of a Collection Letter Should be a Question of Law for the Court or a Question of Fact for the Jury.

The Petitioners contend that there is a split between the Second, Third and Ninth Circuits on the one hand and the Sixth and Seventh Circuits on the other hand on the issue of whether a "collection letter" should be reviewed for violations of the FDCPA by the court as a question of law or by the jury as a question of fact. Petitioners further contend that the Fifth Circuit's decision in this case adds to and widens that split among the Circuits.

The Petitioners have tried their best to mischaracterize a series of cases to create an illusion that there is some separate body of jurisprudence dealing with review of "collection letters." Yet nowhere in the FDCPA did Congress use the word "collection letter" or even "letter". Congress almost exclusively used the terms "communications"[14] and "representations"[15]

---

[14] 15 U.S.C. § 1692a(2) defines "communication" as the "conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692b regulates the conduct of "any debt collector *communicating* with any person other than the consumer for the purpose of acquiring location information." (emphasis added). 15 U.S.C. § 1692c governs "*communication* with the consumer generally", "*communication* with third parties", and "ceasing *communication*." (emphasis added). 15 U.S. C. § 1692e(3) prohibits "the false representation or implication that any individual is an attorney or that any *communication* is from an attorney." (emphasis added). 15 U.S.C. § 1692e(8) prohibits "*communicating* or threatening to *communicate* to any person credit information which is known or

throughout the various sections of the FDCPA. Congress is presumed to have known how to use a term like "collection letter" had it wanted to do so. Congress evidenced its intention to accomplish different goals in different sections by choosing language other than "communication" and "representation" on a handful of occasions where it thought necessary. For instance,

---

which should be known to be false, including the failure to *communicate* that a disputed debt is disputed." 15 U.S.C. § 1692e(9) prohibits "the use or distribution of any written *communication* which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval." (emphasis added). 15 U.S.C. § 1692e(11) prohibits "The failure to disclose in the initial written *communication* with the consumer and, in addition, if the initial *communication* with the consumer is oral, in that initial oral *communication*, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose." (emphasis added). 15 U.S.C. § 1692f(7) prohibits a debt collector from *communicating* with a consumer regarding a debt by "post card." (emphasis added). 15 U.S.C. § 1692f(8) prohibits a debt collector from "using any language or symbol, other than the debt collector's address, on any envelope when *communicating* with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business." (emphasis added).

[15] 15 U.S.C. § 1692e prohibits a debt collector from using any false, deceptive, or misleading *representation* or means in connection with the collection of any debt. Subsection (3) of that section specifically prohibits "the false *representation* or implication that any individual is an attorney or that any *communication* is from an attorney." (emphasis added). Subsection (10) of that section prohibits "the use of any false *representation* or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer." (emphasis added).

Congress very selectively used the terms "postcard,"[16] "envelope,"[17] "use of the mails,"[18] "any instrument of interstate commerce or the mails,"[19] "telegram,"[20] "certain deceptive forms,"[21] "written notice,"[22] and "notifies ... in writing."[23] For the Petitioners to characterize the decisions of the Circuit Courts of Appeals regarding "collection letters" as somehow a different category within FDCPA jurisprudence is disingenuous. No such separate category exists.

If this Court ignores the notion of a separate category of review for "collection letters" and remains focused on the procedural posture of the Courts of Appeals review of such letters as "communications" and "representations" on motion to dismiss and motion for summary judgment, what emerges is not a Circuit split at all, but a body of intelligent case law developed over the past 20 years that continues to guide and assist both counsel and the industry in understanding exactly what is prohibited under the FDCPA. There has never been, and there should not ever be, special treatment or separate jurisprudence for "collection letters" as opposed to any other form of communication or representation governed by the FDCPA. To create such a special category would be sidestepping Congress' carefully chosen and clearly expressed statutory language in favor of judicial legislation at its worst.

---

[16] 15 U.S.C. § 1692f(7).
[17] 15 U.S.C. § 1692f(8).
[18] 15 U.S.C. § 1692f(8).
[19] 15 U.S.C. § 1692a(6).
[20] 15 U.S.C. § 1692f(8).
[21] 15 U.S.C. § 1692j.
[22] 15 U.S.C. § 1692g.
[23] 15 U.S.C. § 1692g(b).

Perhaps the easiest way to see that there is no split among the Circuits on this issue is to look closely at what the Courts of Appeals actually decided in each of the cases Petitioners has cited.

Petitioners assert that the split is between the Second, Third, and Ninth Circuits on one hand that supposedly have held that the question of whether a "collection letter" is false, misleading or deceptive a question of law for the Court, and the Fifth, Sixth, and Seventh Circuits on the other hand that supposedly have held that such a determination is a question of fact for a jury. The cases that the Petitioners cite for the former proposition are *Shapiro v. Dun & Bradstreet Receivable Mgmt. Servs., Inc.*,[24] *Russell v. Equifax A.R.S.*,[25] *Wilson v. Quadramed Corp.*,[26] and *Terran v. Kaplan*.[27] Each of these four cases dealt only with the question of whether language within a debt collection letter overshadowed or contradicted the 30 day validation notices required by section 1692g of the FDCPA.

In *Shapiro v. Dun & Bradstreet Receivable Mgmt. Servs., Inc.*, the Second Circuit affirmed the District Court's order granting the collection agency/defendant's motion to dismiss under Rule 12(b)(6).[28] In that case, the plaintiff alleged only that D&B's collection letter violated section 1692g(a)(3) - (4) and 1692e(10) by containing language in the body of the letter[29] that overshadowed or

---

[24] 59 Fed. Appx. 406, 407-08 (2d Cir. 2003).

[25] 74 F.3d 30, 34 (2d Cir. 1996).

[26] 225 F.3d 350, 353 n. 2 (3d Cir. 2000).

[27] 109 F.3d 1428, 1432 (9th Cir. 1997).

[28] 59 Fed. Appx. at 1.

[29] The language within the body of the letter that Shapiro claimed overshadowed or contradicted the validation notice was the following:

contradicted the validation notice.[30] The Court, citing the prior Second Circuit case of *Russell v. Equifax A.R.S.*,[31] stated "the question of whether language in a collection letter overshadows or contradicts other language in an impermissible fashion is a question of law we review *de novo*."[32] With no question of fact presented and no factual allegations aside from the language of the letter itself, the Second Circuit was able to construe the letter under the "least sophisticated consumer" standard and determine as a question of law that Shapiro had not stated a claim upon which relief could be granted. For this reason, the Second Circuit affirmed the judgment of the District Court.

In *Wilson v. Quadramed Corp.*, the Third Circuit affirmed the District Court's judgment dismissing the plaintiff's claims on the defendant's motion to dismiss under Rule 12(b)(6).[33] In that case, the plaintiff alleged only that Quadramed Corp.'s collection letter violated section 1692g(a) by containing language in the body of

---

> If there are any questions regarding this account, or if you wish to make payment arrangements, please contact [the creditor] directly at [800-number]. Should you wish to dispute this account, please refer to the notice on the reverse side of this letter. . . . If you have already remitted this payment, thank you, and you can disregard this letter.

Shapiro, 59 Fed. Appx. 1 – 2.

[30] *Id.*

[31] The Second Circuit's decision in *Russell* was on the same issue as the decision in *Shapiro*, so the opinion in *Russell* is not discussed here.

[32] *Id.*

[33] 225 F.3d at 351.

the letter[34] that overshadowed or contradicted the validation notice.[35] The Third Circuit never made an affirmative statement in *Wilson v. Quadramed* that the determination of the issue must be by the court as a question of law. Nevertheless, there were no questions of fact presented, so the Third Circuit ruled on the remaining question of law presented. The Court reviewed the language of the letter, applied the "least sophisticated consumer" standard, and found as a matter of law that the letter did not violate section 1692g.[36]

In *Terran v. Kaplan*, the Ninth Circuit reversed the District Court's judgment rendered after a bench trial in favor of the plaintiff on his claim under section 1692g, which was the only claim in the plaintiff's complaint after the plaintiff voluntarily dismissed all other claims.[37] Terran's only allegation was that language within the body of the collection letter overshadowed and contradicted the validation notice required by section 1692g.[38] In deciding on the appropriate standard of review of the District Court's judgment after a bench trial, the Court of Appeals elucidated:

> Similarly, determination of whether language in a collection letter overshadows or contradicts the

---

[34] The language contained in a debt collection letter that Wilson asserted was violative was language stating that the account has been placed with the debt collector for "immediate collection," and that it "shall afford [the debtor] the opportunity to pay this bill immediately and avoid further action against you." *Wilson*, 225 F.3d at 351.

[35] *Id.*

[36] *Id.*

[37] 109 F.3d at 1430 - 31.

[38] *Id.* at 1431.

> validation notice required by section 1692g so as to mislead or confuse a least sophisticated debtor does not turn on the credibility of extrinsic evidence. . . . Thus, we review Terran's claim that the collection letter violated section 1692g *de novo*. . . . "Our role ... is ... the essentially negative one of examining whether a given notice comports with the requirements of the statute."[39]

This is a way of recognizing that there is no factual issue involved where the only allegation is the legal impact of the language contained within a letter. It should not escape notice that in *Terran*, the case was tried to the bench, making the Court the finder of fact, to the extent there were questions of fact involved.

What is clear upon this close review of the cases is that the Second, Third, and Ninth Circuits have not decided that a determination of whether a collection letter violates the FDCPA is always a question of law for the court. These Courts of Appeals merely decided the issue under section 1692g as a question of law, because there were no questions of fact presented. These cases involved only the language contained within the collection letter, involved no "extrinsic evidence," and called for application of the "least sophisticated consumer" standard to determine if the language in the body of the letter overshadowed or contradicted the language of the validation notice in the letter.

---

[39] *Id.* at 1433 (*quoting Payco-General Am. Credits, Inc.*, 943 F.2d 482, 485 (4th Cir. 1991)).

In *Peter v. G.C. Services, LP*,[40] the Fifth Circuit, a Circuit that the Petitioners assert is in conflict with the Second, Third, and Ninth Circuits on this issue, decided the issue under section 1692g using the exact same analysis used by the Second, Third, and Ninth Circuits. In fact, all of the Circuit Courts of Appeals that have written on this particular issue have followed the same analysis.[41]

So what are these Sixth and Seventh Circuit cases that the Petitioners claim represent a split in the Circuits? Let us look at each of the two cases that the Petitioners cite very carefully to see what, if anything, is afoot.

One of the two cases Petitioners cite is *Kistner v. The Law Offices of Michael P. Margelefsky, LLC*, in which the Sixth Circuit analyzed an attorney's collection letter on cross-motions for summary judgment to determine if it violated section 1692e(3).[42] The Sixth Circuit found that there was a genuine issue of material fact, reversed the District Court's summary judgment in favor of the defendants, and remanded the case to the District Court.[43] The Court of Appeals found there was a genuine issue of material fact as to

---

[40] 310 F.3d 344, 349 – 350 (5th Cir. 2002)(citing *Terran v. Kaplan*, *Russell v. Equifax A.R.S.*, and *Wilson v. Quadramed Corp.*).

[41] *Federal Home Loan Mortgage Corp. v. Lamar*, 503 F.3d 504, 509 – 510 (6th Cir. 2007); *Bartlett v. Heibl*, 128 F.3d 497, 501 (7th Cir. 1997); *Miller v. Payco-General American Credits, Inc.*, 943 F.2d 482 (4th Cir. 1991); *See Wilhelm v. Credico, Inc.*, 519 F.3d 416 (8th Cir. 2008); *See also Vega v. McKay*, 351 F.3d 1334 (11th Cir. 2003). As far as the Respondent can tell from his survey of the cases, the First and Tenth Circuits have never decided a case on this particular issue.

[42] 518 F. 3d 433, 441 (6th Cir. 2008).

[43] Id. at 434.

whether the communication was deceptive and misleading, because there was summary judgment evidence in the record creating a fact issue on the attorney's involvement. The summary judgment evidence included, among other things, the deposition testimony of defendant Margelefsky.[44] Thus, clearly there was "extrinsic evidence" that the Court was required to consider, outside of the language of the letter itself, that had a bearing on whether the letter was misleading and deceptive. That "extrinsic evidence" precluded the Court from considering the language of the collection letter only and ruling as a matter of law.

The only other case cited by the Petitioners is *Johnson v. Revenue Mgmt. Corp.*, a case in which the Seventh Circuit decided whether the language of a collection letter overshadowed the validation notice contained in that letter.[45] In that case, the Seventh Circuit reversed and remanded the District Court's order dismissing the plaintiff's section 1692g claim on a Rule 12(b)(6) motion. Although one would expect the Seventh Circuit to have ruled on the issue as a matter of law as it did in *Bartlett v. Heibl* just two years earlier, the Court cautioned that "because the skeletal presentation in a notice pleading may be fleshed out later, a decision without giving plaintiff the opportunity to argue or augment his position is premature."[46] The Court opined further that "if all the plaintiffs have to go on is the language of these letters, they must lose in the end."[47]

---

[44] Id. at 440.

[45] 169 F.3d 1057, 1060 (7th 1999).

[46] Id.

[47] Id.

Nevertheless, *Johnson* does not present a conflict among the Circuits. As noted above, in *Bartlett v. Heibl* the Seventh Circuit held that a determination of whether a collection letter violates section 1692g(a) by containing language that overshadows the validation notice is a question of law for the Court.[48]

The end result of this survey of the cases Petitioner cited is that there is currently no conflict among the Circuits at all in applying the "least sophisticated consumer" test to determine whether a letter violates the FDCPA. In each of the cases the Petitioners cited, the Courts of Appeals reviewed the "collection letter" as a communication, representation, or written notice depending upon the section of the FDCPA the plaintiff alleged in her complaint. The cases came before the Courts of Appeals either on review of an order on motion to dismiss or motion for summary judgment. If there were no allegations pleaded in the complaint (with respect to motions to dismiss) or summary judgment evidence offered (with respect to motions for summary judgment) that was "extrinsic" to the letter, there was only one thing remaining for the Courts to do - determine whether the language of the letter violated the FDCPA. Where there were facts pleaded in the complaint that were "extrinsic" to the letter, the Courts did not dismiss the claim as a matter of law. Where there were facts presented as summary judgment evidence that were "extrinsic" to the letter and that related to whether the letter violated the FDCPA, the Courts did not grant a summary judgment

---

[48] 128 F.3d 497, 501 (7th Cir. 1997).

as a matter of law.[49] The Circuit Courts of Appeals have decided these cases with clarity and consistency.

Regardless of the fact that there is currently no split among the Circuit Courts of Appeals, Respondent would contend that to the extent that a Court should decide that the language contained within a collection letter presents a question of fact, such a decision should not be considered judicially strange or dangerous. A collection letter is nothing more than a form of communication; a gathering of written representations made by a debt collector. The Petitioners would not flinch if a Court of Appeals decided that a series of oral statements made by a debt collector in the heat of a collection call constituted a question of fact for a jury to determine. There is no difference between these oral statements as a communication and written statements in a collection letter as a communication.

---

[49] There have been instances where there was no issue of fact regarding the "extrinsic" evidence, in which case the Courts were free to determine as a question of law whether the letter contained misleading or deceptive representations. *See e.g. Goswami v. American Collection Enterprises, Inc.* 377 F.3d 488 (5th Cir. 2004), *cert. denied*, 126 S.Ct. 331, 163 L.Ed.2d 44 (2005). In *Goswami* the defendant's collection letter was a settlement letter stating that the plaintiff had only 30 days to take advantage of the settlement, which was a discount of 30% off the debt. *Goswami*, 377 F.3d at 492. The plaintiff alleged in her complaint that this was a false, misleading, and deceptive representation, because the defendant had authority to settle the debt outside of that time period. *Goswami*, 377 F.3d at 495. The summary judgment evidence showed that the defendant had authority to settle the debt for up to a 50% discount and at any time. *Id.* The Fifth Circuit held that there was no genuine issue of material fact and granted judgment as a matter of law to the plaintiff, reversing the judgment of the District Court.

The concept of a jury trial to determine whether a representation in a letter is deceptive seems to have been contemplated by Congress. In Section 1692k Congress specifically and expressly addressed certain instances in which the court, as opposed to a jury, must make the determination. In section 1692k(a)(2), Congress expressly provided that the amount of additional damages awarded to a successful consumer shall be "as the court may allow."[50] In section 1692k(a)(3), Congress gave the court the sole ability to make awards of attorney's fees and costs to a successful consumer or to a debt collector where the suit was brought in bad faith for the purposes of harassment.[51] Congress left all other questions of fact to a jury, if one was requested by either party. There is simply nothing offensive about the notion of allowing a jury to review a collection letter to determine if, as a question of fact, it contains false, misleading, or deceptive representations.

In this case, the Respondent alleged in his complaint that the Petitioners' collection letter was not sent by a law firm at all, but by a collection agency posing as a law firm and that there were no attorneys that would ever review the Respondent's account. The Fifth Circuit decided that the Respondent's claims could not be dismissed on the grounds of the disclaimer only, and that the disclaimer on the back of the letter could not, as a matter of law, salvage such a misrepresentation. The Fifth Circuit wisely stated that the letter also did not contain misrepresentations as a matter of law. The Fifth Circuit's decision recognized that there were factual allegations outside of the letter

---

[50] 15 U.S.C. § 1692k(a)(2)(A) – (C) & (b).

[51] 15 U.S.C. § 1692k(a)(3).

that Respondent had pleaded that made dismissal improper on a motion to dismiss under Rule 12(b)(6).

In this case, it may be that after discovery it becomes clear (on a motion for summary judgment) that there is no question of fact and the District Court may then rule as a matter of law. It may also turn out after discovery that there are questions of fact outside the letter that bear on whether the letter is deceptive and misleading, and a jury will have to decide those fact questions. In any event, the disclaimer alone is not and cannot be dispositive on a motion to dismiss under Rule 12(b)(6) given the facts pleaded in the Respondent's complaint.

How important are these legal issues that the Fifth Circuit has decided? The Petitioners would have this Court believe that the sky in the collection industry is falling. Has the collection industry ground to a sudden halt in the wake of the Fifth Circuit's decision in the *Gonzalez*? No. Has there been a wave of bankruptcy filings by law firms engaged in the collection of consumer debts? No. Have collection agencies and collection attorneys stopped sending collection letters to consumers altogether? No. Collection agencies and collection attorneys march on, as before, now with even more instruction from the Fifth Circuit to do as the FDCPA has always commanded them -- to collect consumer debt without the use of abusive debt collection practices such as the use of false, deceptive, or misleading representations and means in the collection of the debt. The Fifth Circuit has been quite specific in what this means in the context of this case:

> For attorneys who choose to collect consumer debts, they must provide a clear, prominent and conspicuous statement that although the letter is from a lawyer; the lawyer is acting solely as a debt collector and not in the legal capacity when sending the letter. With respect to a collection agency acting solely as a debt collector, not to send any message that a lawyer is involved because this deceptively sends the message that "the price of poker has gone up."[52]

If the law were as Petitioners advocate, a collection agency, acting only as a debt collector with no attorneys employed or associated in any way, could mass mail form collection letters to consumers across the country purporting to be a law firm with a completely different name, and escape liability as long as it placed a disclaimer on the back of the letter stating that no attorney had reviewed the consumer's account. Of course no attorney would have reviewed the account at that time, since there were none! This is the exact situation in the case at hand.

There is no conflict existing among the Circuit Courts of Appeal on application of the "least sophisticated consumer" standard to collection letters to determine whether they are in violation of the FDCPA. Because there is no split among the Circuits on any issue before this Court, this Court should deny the Petition for a Writ of Certiorari.

---

[52] *Gonzalez*, 577 F.3d at 607.

CONCLUSION

This Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

Matthew B. Probus
Wauson ♦ Probus
One Sugar Creek Center Blvd., Suite 880
Sugar Land, Texas 77478
(281) 242-0303 (Telephone)
(281) 242-0306 (Facsimile)
mbprobus@w-plaw.com
ATTORNEYS FOR RESPONDENT, JOSE GONZALEZ